No. 11,715

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR A. SADLER,
Appellant,

vs.

CLARENCE T. SADLER,
Appellee.

BRIEF FOR APPELLEE.

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Appellant's statement of the case is considered inaccurate and insufficient properly to present to the Court the evidence upon which the judgment of the trial court is based. Hence, appellee offers the following:

STATEMENT OF THE CASE.

Reinhold Sadler died on January 29, 1906. (R. 48) He left a will which was admitted to probate in proceedings instituted in the First Judicial District Court of the State of Nevada in and for the County of Ormsby, a copy of the will being attached to plaintiff's complaint as an exhibit. (R. 8-10.) The proceedings for the administration of the estate of Reinhold Sadler have never been closed. (R. 49.) Louisa Sadler, his widow, was appointed and qualified as

administratrix of his estate. (R. 49.) Reinhold Sadler's will disposed of his estate as follows: one-third to his wife, Louisa Sadler, and two-thirds in equal shares to his children, share and share alike, and "in case of death of either of my children, then I leave the portion to which it would be entitled to remaining ones and my wife share and share alike." (R. 9.) During his lifetime five children were born to Reinhold Sadler, namely Wilhelmina, Edgar, Alfred, Bertha and Clarence. Wilhelmina predeceased Reinhold Sadler, dying on September 5, 1903. (R. 49.) His widow, Louisa Sadler, and the other four children, Edgar, Alfred, Bertha and Clarence survived him. All are now dead except Clarence and Edgar. Bertha died, a single woman without issue, on April 29, 1921. Louisa Sadler died August 6, 1923, a widow without additional issue. No proceedings have been instituted for the administration of the estate of Louisa and Bertha. (R. 49-50.) Alfred Sadler died March 5, 1944 and Kathryn Powers Sadler is his duly appointed and qualified administratrix. Edgar Lane Plummer is the son of Wilhelmina Sadler, and is, therefore, an heir at law of Louisa Sadler. (R. 50.) (The foregoing facts are admitted by the pleadings.)

During his lifetime Reinhold Sadler acquired the Diamond Valley Ranch in Eureka County, Nevada (Ex. F-1), and deeded it to the Diamond Valley Livestock and Land Company, a corporation. (R. 602-5.) This corporation had ceased the user of its franchise for over thirty years prior to 1918, and had conveyed its property to the Huntington and Diamond Valley

Stock and Land Company, a California corporation (Ex. D attached to plaintiff's complaint, R. 33-34).

At the time of his death Reinhold Sadler owned 4,000 shares of the capital stock of the Huntington and Diamond Valley Stock and Land Company (Ex. 17—Inventory of R. Sadler Estate, R. 204-9), and an additional 1999 shares of said company which had been pledged to secure a loan to him from Minnie C. Sadler (Ex. 18—Claim of Minnie C. Sadler against estate of R. Sadler, R. 213-16).

After the death of Reinhold Sadler, the question of the ownership of the Diamond Valley Ranch, and other properties, was a matter of dispute between the heirs of Reinhold Sadler and the Hermann J. Sadler branch of the family, acting through the Huntington and Diamond Valley Stock and Land Company, a corporation.

On December 31, 1915 the Huntington and Diamond Valley Stock and Land Company brought an action in the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko to quiet title to real property situated in Elko, White Pine and Eureka Counties, Nevada, the Diamond Valley Ranch being included in the property described in the complaint. Edgar, Alfred, Bertha, Clarence and Louisa Sadler were named as defendants, as was Louisa Sadler in her representative capacity as administratrix of the estate of Reinhold Sadler, deceased. (R. 50, 12-17.)

After the death of Reinhold Sadler, Edgar, Alfred, Bertha, Clarence and Louisa Sadler claimed the

Diamond Valley Ranch, or an interest therein, *as heirs* of Reinhold Sadler. This fact is clearly established by original Exhibits 2, 3 and 4, certified to this court, which are powers of attorney to Alfred Sadler from Edgar Sadler, Edgar Lane Plummer and Clarence Sadler, dated and recorded in December, 1912. *Exhibit 2,* the power of attorney from Edgar Sadler to Alfred Sadler dated December 28, 1912 authorizes Alfred Sadler to represent Edgar Sadler

> "in all matters pertaining to his interest as an heir at law of the estate of R. Sadler, deceased, in general, and more particularly in reference to lands which the Huntington and Diamond Valley Stock and Land Company, a supposed California corporation holds under trust; the lands are situate in White Pine, Elko and Eureka Counties, State of Nevada."

The authorizations granted by original *Exhibits 3 and 4* are similar in form, and the three powers of attorney were filed for record at the same time by defendant Edgar Sadler.

Further, the heirs of Reinhold Sadler filed a joint answer to the amended complaint in the quiet title suit, Edgar Sadler joining with the others. In this Answer (Ex. 1), these parties jointly admitted that they claimed an adverse interest in the lands and water rights involved in the action, and denied that their claim was without any right. (Para. 5 of Ex. 1.)

In December, 1917 and January and February, 1918 negotiations were under way between the plaintiff and the defendants in the quiet title suit looking toward

its settlement. Defendants were represented in Elko by the law firm of Curler and Castle, and in Reno by the law firm of Cheney, Downer, Price & Hawkins. Plaintiff, Clarence T. Sadler, was in the United States Army as a flying cadet (R. 251), and was represented in the negotiations and settlement by Alfred R. Sadler, acting under the power of attorney. (Ex. 3.) These negotiations are exemplified by plaintiff's exhibits 5, 6 and 7. (R. 150-157.)

In accordance with his expression of intention as stated in Exhibit 7, Edgar Sadler visited in Reno and Carson City, Nevada. A Stipulation (Ex. 16, R. 18-20), dated February 14, 1918, for the settlement of the quiet title suit was prepared and signed by the defendants. Among other things, the Stipulation provided that the title to the Diamond Valley Ranch should be quieted in Edgar and Alfred Sadler; that the title to the rest of the property should be quieted in plaintiff; that the money to be paid plaintiff should be the obligation only of Edgar and Alfred Sadler; and that the counterclaims be dismissed.

A letter (Ex. 20, R. 282-3) was written by Louisa Sadler to Alfred Sadler under date February 29, 1918, regarding the settlement, which reads, in part, as follows:

> "Bertha and Myself wanted you and Edgar to write a agreement for how long you wanted the morgage of the Diamond Ranch and Cattle. You have to pay me $50.00 per month and say who has to pay the money to me, and what date, so I am sure of the money. We want this in black and white so in case something should happen to you

or Edgar, we will have no trouble like with the Sadlers in the City and be sure of our property, and sell the Ranch for what it is worth at the end of that time and devide the money accordence to the Will, and you have to look out for Clance to. Edgar will have to pay for Clarence Insurance on his Police in May 24, if he is still in the Army, for Bertha says, she is not able to pay it, she paid out so much for Clarence. Edgar had all the income from the Ranch and he must pay it. You and Edgar should make another agreement to each other in black and white so you know what each one has to do, and in case something happing that you are safe of your property and money.

Allway make yourself safe in business so you will have no trouble later on."

March 2, 1918 is the date of the culmination of the negotiations for settlement of the quiet title suit and of the dispute which had existed since Reinhold Sadler's death between his heirs and the Huntington and Diamond Valley Stock and Land Company regarding the ownership of the Diamond Valley Ranch and cattle and the other properties situated in Elko and White Pine Counties. On March 2, 1918 the stipulation dated February 14, 1918 (Ex. 16, R. 18-20) was filed in the quiet title suit, and a Decree (Ex. D attached to plaintiff's complaint (R. 23-34) was entered in the action pursuant to the stipulation, by the terms of the Decree the title to the Diamond Valley Ranch being quieted in Edgar and Alfred Sadler. On March 2, 1918 Hermann J. Sadler, as attorney in fact for the Huntington and Diamond Valley Stock and Land

Company, deeded the Diamond Valley Ranch to Edgar and Alfred Sadler, and this action was confirmed by a deed from the corporation dated March 12, 1918. (R. 34-40.) On March 2, 1918 Alfred and Edgar Sadler executed a mortgage on the Diamond Valley Ranch (Defs. Ex. C, R. 538-43) to the Washoe County Bank as security for a loan of $16,500.00. On March 2, 1918 Alfred Sadler and Edgar Sadler executed a chattel mortgage on the 250 head of cattle on the ranch to the Washoe County Bank as additional security for the same loan of $16,500.00 (Defs. Ex. A, R. 231-32). It is admitted by the pleadings that the sum of $16,500.00 so borrowed was disbursed as follows: $15,000.00 to the Huntington and Diamond Valley Stock and Land Company in accordance with the settlement agreement, and $1,500.00 to pay the fees of defendants' attorneys in the quiet title action.

On March 2, 1918 defendant Edgar Sadler, and his brother Alfred Sadler, signed a written trust agreement (Original Exhibit 8, R. 41) as follows:

"A Agreement

Dated March 2, 1918

Reno, Nevada
and
Carson City, Nevada

"This agreement is made between the following persons as follows:

Edgar Sadler of Eureka Co., Nevada
Alfred Sadler of Washoe Co., Nevada
Bertha Sadler of Ormsby Co., Nevada
Mrs. Louisa Sadler of Ormsby Co., Nevada

Clarence Sadler of Washington, D. C. by Alfred R. Sadler thru the Power of Attorney.

That as soon as possible the mortgage on the Diamond Ranch in Diamond Valley, Eureka County, Nevada be lifted the lawyers fees paid and that the first good chance for the best price possible this aforesaid ranch or property be sold and then that the remainder of the money be divided according to the last Will and Testament of Reinhold Sadler, deceased——

Mother desired fifty dollars each month that is by the 10th of each month.

A settlement of the ranch cattle with the same terms of the Will.

Edgar Sadler
Alfred Sadler"

On March 18, 1918 H. U. Castle of the law firm of Curler & Castle, Elka attorneys for the Sadler family, wrote a letter to Alfred Sadler as Follows (Ex. 19, R. 220):

"Just received the deed from the Corporation conveying the Diamond Valley Ranch to you and Edgar which is in addition to the decree and the deed made by Hermann as attorney in fact. Also got the withdrawal from your aunt withdrawing all claims against your father's estate. These papers I have sent to Cheney, so please call at his office and get the withdrawal and do what you wish with it.

"Have delivered the deeds to Van Fleet, I mean the Harvey and Wilhelmine Sadler patents have been turned over.

"I just w*n*at to add that on the day we got back to Elko, Edgar was offered $40,000. for the rance alone but refused to take it as he is holding for a better price in case you and he wish to sell.

Better keep this to yourself though as Bertha may raise or try to raise more hell."

Clarence T. Sadler testified that he first saw the trust agreement (Ex. 8) in May or June, 1918, while he was visiting his mother, Louisa Sadler, in Carson City, Nevada. (R. 28F.) Louisa Sadler died on August 6, 1923. Her funeral was held at Carson City, Nevada in August, and the three brothers, Edgar, Alfred and Clarence, and Clarence's wife, Reba (Dorris), were present for the funeral. Both Clarence Sadler and Reba Sadler testified that the question of selling the Diamond Valley Ranch was discussed, and that Edgar Sadler placed a value of approximately $15,000.00 on Clarence's interest and agreed to make a definite effort to sell. (R. 284-6, 425-6.)

Clarence and Reba Sadler testified that in July, 1925 they visited the Diamond Valley Ranch enroute to Salt Lake City, Utah. A sale of the ranch was discussed and Edgar placed a price on it of $75,000.00. (R. 286-7, 426.) On August 4, 1925, Clarence wrote Alfred a letter from Salt Lake City about his talk with Edgar at the ranch, and kept a copy. (Ex. 22, R. 293.)

On March 19, 1927 and September 14, 1927 Alfred Sadler wrote to Clarence reporting on conditions at the ranch. (Ex. 23 and 24, R. 295, 299-81.)

On September 15, 1928 Alfred Sadler wrote to Edgar suggesting that the latter should borrow $5,000 on the security of the Diamond Valley Ranch so that Alfred might build a home for his family. (Ex. P, R. 579-81.)

Exhibit 25 (R. 303), consists of two letters, one dated January 18, 1929 from Alfred to Clarence, enclosing a letter dated December 22, 1928 from Edgar to Alfred, reporting on the refinancing of the ranch and repairs thereto.

Ethel Sadler (Edgar's wife) and their daughter, Violet, visited Clarence Sadler and wife in their home in Berkeley, California, in June, 1930. During her visit, a sale of the Diamond Valley Ranch was discussed, and Ethel was requested to obtain a sale price from Edgar on her return to the ranch so that the ranch could be sold, the mortgage paid, and the balance divided between the heirs of Reinhold Sadler. (R. 680, 681.) On July 12, 1930, after returning to the ranch, Ethel Sadler wrote Clarence's wife as follows (Ex. 41, R. 489):

> "Edgar said he was willing to sell any time he could receive $65,000 for the ranch alone. He said the way ranches are selling at the present time it is worth it. * * *
>
> "I surely enjoyed every minute of my visit * * *
>
> "With love from all to all,
>
> Ethel."

Clarence Sadler then wrote to Alfred, and received a reply from Alfred under date August 8, 1930 in part as follows (Ex. 43, R. 682):

> "Your letter received and contents noted.
>
> "From what you say, the property would have to be sold for about $75,000 to get the commission and etc. to bring a net of $65000.
>
> "The data in regard to acreage would have to be secured from Edgar and average cut of hay

> of the cultivated land, *the the* average from the meadow land."

Clarence Sadler listed the ranch property for sale with real estate agents in Los Angeles and San Francisco. (R. 305-335.)

In February, 1931, Clarence Sadler and Alfred conferred with Edgar Sadler in the Golden Hotel in Reno, Nevada. Alfred and Clarence offered to sell their interests to Edgar and Edgar said he would try to borrow the money from the Reno National Bank. Edgar also agreed to supply complete information regarding the ranch so that it could be offered for sale through real estate agents. (R. 308-10.)

After this conference, on March 8, 1931 Alfred wrote Clarence as follows (Ex. 27, R. 311):

> "Edgar and Ethel has not said anything further about our talk to Edgar and do not know what he is going to do. * * *
>
> "I think you had better write Edgar to send you the data in regard to the ranch and this might sort of force them to say what they are going to do. I will tell him that you expect to be in Los Angeles about two months."

On April 6, 1931, Alfred wrote Clarence again, and enclosed data regarding the ranch in the writing of Ethel Sadler on the stationery of the 35th Session, Assembly Chamber (Edgar was a member of the Assembly that session). Among other things, Ethel stated: "Considered one of the best ranches in Eureka Co. due to unlimited supply of water. Price $65,000."

Alfred, in his letter to Clarence, said (Ex. 28, R. 316-20):

> "Edgar I guess is not going to take up the proposition of buying the interest in the ranch. I do not think he can get the money from what he said. I think that he tried to make a borrow from the Reno National Bank but they told him money was too tight. * * *
>
> "I am sending you the data that they sent down to me to send to you since their return to the ranch. They did not take any trip to California as from what Edgar said his expenses were $250 more than he received from the Legislature and that they did not have the money. So much for things in general and I guess Ethel was sore because I told her that you were down in Los Angeles and they had better send the data to you if they did not want to consider the proposition."

This letter was followed by one from Alfred to Clarence on April 11, 1931, in which Alfred wrote (Ex. 29, R. 321):

> "Just a few lines to let you know that I have written to Edgar to send you more data in regard to the ranch. The assessed value of the property in Eureka County and the rate of taxes per hundred dollars in the County. The price per head he would take for his cattle and the number that could be had on the property.
>
> "Also to send you some snap shots of the Springs and the reservoir that is impounding the water. Which I hope that they will send to you before you return to Berkeley and while you are still in Los Angeles."

And again on May 8, 1931, Alfred wrote Clarence (Ex. 30, R. 325):

> "I have not heard anything from the ranch or any word from Edgar. Do not know whether he has sent you any more data in regard to same or not."

On May 20, 1931, Alfred wrote Clarence as follows (Ex. 31, R. 329):

> "I have not received any letter from out at the ranch and do not know whether they have sent you any more data or not. I guess they now are guessing what to do in regard to the same but judge he cannot get any money to take up the proposition."

On June 16, 1931, Alfred had received a letter from Ethel Sadler (Edgar's wife) and he wrote Clarence, enclosing Ethel's letter. These two letters comprise Exhibit 32. (R. 332.) Ethel had written Alfred:

> "We received a letter from some real estate firm that Clarence had spoken to wishing more data which I sent also some pictures of the spring and house and barns. I don't imagine anyone would buy a year like this and we wouldn't sacrifice our cattle after staying with them so long unless we got a good price. * * *
>
> "We are as desirous to sell as anyone if we get a satisfactory price but I think it ridiculous to even talk sell a year like this—it seems to me it shows poor business ability.
>
> "I will send whatever we receive from the Real Estate men on to you."

Commenting on Ethel's letter, Alfred wrote:

"I enclose a letter that I received from Ethel. She says that she has sent some data to the real estate men in Los Angeles. It looks as if she is getting afraid that a buyer is going to show in regard to the ranch. I said that she said the price of the ranch was $65000—$13500—$51500 cash and the buyer to assume the mortgage of $13500, which I thought was a good price for the property. What they want in regard to cattle I do not know and they do not say. It looked as if they now are beginning to worry a little because she has went in Reinhold in buying cattle and prize is dropping in regard to same."

On July 28, 1932, Clarence wrote Alfred as follows (Ex. N, R. 573):

"I called at the Federal Farm Bank in Berkeley this morning and got some information on the ranch loan. I am enclosing sheet with the figures. Mr. Hodgson believes that we could increase the loan to $18,500. Of course, if another application is made for money it will require another appraisal. The loan now is $13000. You will note from the sheet that in March 1930 Edgar tried to borrow $4000 more to invest in cattle. Don't you think it is about time he starts in buying our share instead of borrowing more money on the land investing same in cattle exclusively for his benefit?

"We should go after him to borrow this $5000 from the bank and another $5000 on his cattle and buy us out. Then he would have the whole thing and could do with it as he pleased. Instead he

wants to put more debt on the land entirely for his benefit. It is about time we made a move. Don't believe he made application for the money after our talk in Reno because there was no reference to the matter in the file. You will note the Bank's appraisal is over $40,000 and says the ranch will bring $30,000 on a forced sale. This would be about $5,000 apiece after the loan is paid if the court at Carson should order it sold and distribution made of the money between the heirs.

"You will also note that a part of the loan went to Tom Dixon on cattle for the ranch. Of course, Edgar and Ethel now claim the cattle."

Another conference was held at the Golden Hotel in Reno, Nevada in March, 1933, between Edgar, Alfred and Clarence Sadler. Alfred and Clarence offered to sell their interests to Edgar for $6,000 each, and Edgar said that if he could raise the money he would accept the offer. He said he would apply for an additional loan through Mr. Hatch at Elko, the representative of the Federal Farm Bank of Berkeley (R. 348-9).

On September 2, 1933, Alfred Sadler wrote Edgar a letter, in part as follows (Ex. M, R. 570):

"I just returned from a few days down in Berkeley and San Francisco. I was over to the Berkeley Land Bank which has the mortgage on the ranch. I inquired into conditions and find the situation good in regard to securing a loan.

"The question is as follows:—now since Reinhold is married and intends to live on the ranch and continue in this line, I thought that you and him

would like to buy my interest out in the property. I believe that the same could be done if you and Reinhold intend to go together and run the same."

Not having received a reply, Alfred wrote Edgar again on September 14, 1933, as follows (Ex. L, R. 568):

"I have not heard in regard to what you think about the buying of the interest I hold in the ranch.

"From the present looks of things, I will no doubt be let out of the position down here as they are short of funds to continue the same work in surveying the Public Lands. I guess I will have to give Clarence $5000.00 cash for the interest he claims in the Estate. * * *

"Maybe Reinhold and Floyd would go in with you in regard to the Ranch proposition."

Alfred received a reply dated September 15, 1933, made a copy of it, and sent it to Clarence, the reply from Edgar being (Ex. 34, R. 352):

"Received your letter and contents noted in letter will go up to Elko in a few days as soon as we get second crop of hay up. And go see those people But do not think I can get that much money as they are slow in letting loan up this way on ranches. But will try them again."

On November 23, 1933, Alfred wrote Clarence again, and said (Ex. 35, R. 355):

"He (Edgar) was over to Elko the latter part of October and saw Mr. Hatch about the loan. It seems that instead of a man from Berkeley com-

ing to look in the matter The Government has sent a man from Salt Lake. This new man seems to be turning down the application for loans. As yet no man has come to the Ranch to look in *too* the matter. But Mr. Hatch told Edgar that the man from Salt Lake was turning things down right and left. * * *

"He (Edgar) said conditions was very bad in Elko Co. The trouble now about the loan seems to be in regard to the Ranges that the different farmers claim of the Public Area. Unless this matter is straightened out it will be a question of getting a loan."

On December 8, 1933, Alfred wrote a follow-up letter in which he enclosed a copy of a letter to Edgar from L. F. Hatch, the Federal Farm Bank representative. These comprise *Exhibit 36.* (R. 361.) Alfred wrote:

"Therefore I judge he will not get a loan further on the ranch. * * * Conditions tough and they have sold no cattle as yet."

Mr. Hatch had written Edgar:

"I would advise that you do not attempt to put an increased loan on your property at this time."

On September 13, 1937, Alfred Sadler wrote Edgar Sadler a letter as follows (Ex. K, R. 565):

"I heard a report that you were selling all the cattle on the ranch and range; about 800 head for $60.00 per head. What is going on and doing, have you a offer for the ranch property also? What is the plan, this is all news to me. Is the

program that you are quitting the ranch and let the Federal Land Bank foreclose on the loan that we borrowed on the ranch. If so I would like to know.

"Are you selling out to Reinhold and Floyd and they thinking of Running the ranch? If so, I do not see on what sort of plan they figure to do this.

"Cattle being sold might just sell the ranch and wind up the whole concern.

"Clarence will be hearing of this report and I will be receiving some hot letters to know where he is coming off in the interest he claims in the ranch. (a ¼ interest).

"He seems to know about that $3000.00 loan that took a year to get from the Federal Land Bank and said he does not understand why you did not secure a commission loan of $10000 and pay him $6000 for the ¼ interest he owns.

"I suppose you are through with cutting and putting up the hay. It is warm weather down here at present. The children are all going to school now. With love and kisses from us all to you all."

At the same time Alfred was in touch with Clarence, and wrote him on October 9, 1937, as follows (Ex. 37, R. 364):

"I have not heard from Edgar in regard to my letter.

"I asked him what was the amount of mortgau*g*e held by the Federal Land Bank on the property.

"How many head of cattle he sold this fall. Nothing in regard to buying us out, as yet, Ethel said

in her letter that the boys did not have any money to buy."

On October 15, 1937, Edgar replied to Alfred's letter of September 13, 1937, and said that the balance due on the mortgage on the ranch was $12,225.76, that there were no buyers and he could not sell, and that he had been lucky to hold onto the ranch the past seven years. Alfred sent this letter to Clarence, writing him on October 18, 1937 (the two letters comprise Exhibit 38, R. 367). Alfred wrote:

"Herewith is the letter that I received from Edgar relative to the ranch.

"He has not sold any Cattle but waiting for a better price.

"In fact the situation is, he has to get the O.K. from the Loan Bank before he can sell."

On September 24, 1937, Alfred had also written the Eureka County Assessor for a copy of the 1937 tax roll. He sent a copy of this letter to Clarence, and added a note to Clarence at the bottom. The note is as follows (Ex. 39, R. 370):

"I wrote a letter on my return saying it was reported they sold 800 head of cattle at $60.00 per head. And asked him what his plans were now going to be about the ranch, whether the boys were going to run the ranch. You see the letter that came back. And if he would buy our interest in the same."

While on a deer hunting trip in October, 1938, Clarence Sadler stayed at the Diamond Valley Ranch

and discussed with Edgar the possibility of selling the ranch. (R. 371.)

In May or June, 1939, Edgar and Ethel Sadler visited Clarence and Reba Sadler in Berkeley during the Fair, and at the time of the funeral of Ethel's brother, Tom. The ranch was discussed and Edgar said he did not know just when he would sell. Clarence said he wanted to get his money out of it, and suggested that the boys, Reinhold and Floyd might be able to buy them out. (R. 372-3, 427.)

Alfred Sadler died March 5, 1944. (R. 244.) On March 6, 1944, Edgar and Clarence were present in Alfred's home in Reno, and Edgar for the first time denied that Clarence had any interest in the ranch. (R. 375.) Subsequently, Clarence learned that at a conference in Mr. Kearney's office Edgar had denied that he had signed any trust agreement, and again repudiated Clarence's interest. (R. 687.) On May 6, 1944, Clarence wrote Edgar requesting a recognition of his interest as a beneficiary of the trust. (Ex. J.) This letter was written prior to the institution of this action, was received by Edgar and was not answered by Edgar. (R. 653, 657.)

SUMMARY OF ARGUMENT.

There is no absence of indispensible parties. All the beneficiaries of a trust are not indispensible parties to an action against a repudiating or defaulting trustee to establish the trust or to require the trustee to ac-

count. This principle is established by controlling federal authorities, which distinguish those cases relied upon by Appellant. Edgar L. Plummer requires no special treatment as an alleged indispensible party, because Appellee did not seek, and the trial court did not decree, an order fixing Appellee's aliquot share, or its distribution to him.

The decree of the trial court operating *in personam* against Edgar Sadler to enforce a trust agreement does not purport to interfere, and does not interfere, with an hypothesized possession of the trust property by the state probate court. Edgar Sadler cannot avoid his fiduciary obligations by setting up a claimed adverse title or interest in the trust property in some third party.

Appellee does not seek to impeach, set aside, or collaterally attack the decree in the Elko County quiet title suit. The quiet title decree entered March 2, 1918 does not estop Appellee, because he recognizes it and asserts equities arising under it and concurrently with it. The quiet title decree was entered by consent, and in part performance of an agreement of settlement, and is not a bar to a suit for an appropriation of the fruits of the settlement.

Appellee established the trust by clear, satisfactory and unequivocal evidence, the agreement being memorialized by a memorandum sufficient to satisfy the Statute of Frauds.

The finding of the trial court that Appellee was not guilty of laches or unreasonable delay is convincingly

supported by the evidence. Appellant consistently recognized the interests of his brothers through the years until March 6, 1944, when he first repudiated them. Laches will not defeat an express trust unless there is an unequivocal repudiation by the trustee, followed by unreasonable delay which prejudices the trustee. A close family relationship rebuts the imputation of laches and a continued acknowledgment of the trust is sufficient to account for any delay. Appellant shows no prejudice to him resulting from the delay. The evidence offered is not obscure, but is clear and convincing. The decision of the trial court, rejecting the defense of laches, is controlling unless it is shown to be so clearly wrong as to amount to an abuse of discretion.

The evidence clearly shows that after the death of Reinhold Sadler, his heirs claimed through him some interest in the Diamond Valley Ranch. We are not now interested in re-trying the issues in the quiet title suit. It does not appear that a finding regarding the ownership of the ranch at the time of Reinhold Sadler's death, or the ownership of any corporation stock, is material, although the finding made by the Court is supported by the evidence.

The trust agreement, Exhibit 8, is a sufficient memorandum, and is unilateral in character, the other Sadler heirs having fully performed their obligations under the settlement agreement. It is signed by the parties sought to be charged. Other contemporaneous documents may be construed with it.

ARGUMENT.

ALL THE BENEFICIARIES OF A TRUST ARE NOT INDISPENSIBLE PARTIES TO AN ACTION AGAINST A REPUDIATING OR DEFAULTING TRUSTEE TO ESTABLISH THE TRUST OR TO REQUIRE THE TRUSTEE TO ACCOUNT.

The first two points in Appellant's Brief assert the argument that the trial court lacked jurisdiction because of the absence of indispensible parties. It is claimed that Edgar L. Plummer and a legal representative of the estate of Louisa Sadler must have been joined as parties for the court to have the power to determine the controversy presented by the pleadings. These absent parties are co-beneficiaries of the trust sought by Clarence Sadler to be established against Edgar Sadler, and the question presented is whether all the beneficiaries of a trust must be joined as parties in an action of this character.

It has been established since federal procedure was in its infancy that the other beneficiaries of an alleged trust are not indispensible parties to an action by one or some of the beneficiaries against the trustee to establish the trust and for an accounting. The interests of the beneficiaries are separable and are not "joint" within the meaning of the test applied in determining who is an indispensible party. This was the law under the former equity practice, and is the present law under the Federal Rules of Civil Procedure (Rule 19).

Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260;
Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657;
Waterman v. Canal-Louisiana Bank, 215 U.S. 33, 54 L. Ed. 80, 30 S. Ct. 10;

Rogers v. Penobscot Mining Co., 154 Fed. 606;
Atwood v. National Bank of Lima, 115 F. 2d 861;
De Korwin v. First National Bank of Chicago, 156 Fed. 858;
Asher v. Bone, 100 Fed. 315;
Currier v. Currier, 1 F.R.D. 683;
Roos v. Texas Co., 23 F. 2d 171;
Thomas v. Anderson, 223 Fed. 41.

The same rule applies to tenants in common of a legal, rather than equitable, estate. See *Chichester v. City of Newark,* 162 F. 2d 598, and cases there cited.

Appellee's Amended Complaint in the instant case sought only the establishment of the trust and an accounting. (R. 55.) The court decreed the trust against Edgar Sadler and ordered an accounting. (R. 95-97.) That others, not parties, may share in the benefits of the litigation is immaterial. Their non-joinder has not prejudiced them.

The authorities cited by Appellant are distinguishable. The opinions in *Roos v. Texas Co.* (supra) and *Atwood v. National Bank of Lima* (supra) are guides to the distinguishing elements. The principal object of the action involved in certain of Appellant's citations was to fix one beneficiary's share of a fund as against other beneficiaries (*Brown v. Chistman,* 126 F. 2d 625; *Edenborn v. Wigton,* 74 F. 2d 374; *Franz v. Buder,* 11 F. 2d 854). Obviously, the absent beneficiaries are indispensible parties, as they are the persons adverse in interest to plaintiff. No such relief was sought or granted in the instant case. In others

of Appellant's authorities (*Baird v. Peoples Trust Co.,* 120 F. 2d 1001; *Stevens v. Smith,* 126 F. 706; *McArthur v. Scott,* 113 U.S. 340, 28 L. Ed. 1015, 5 S. Ct. 652) the indispensability of remainderman or the trustee in a suit involving the interpretation of a trust instrument was the question presented. There the rights of persons having an indivisible succeeding interest, rather than a severable present interest, were to be affected by an action to which they were not parties. In a partition suit (see appellant's cases, *Kendrick v. Kendrick,* 16 F. 2d 744; *Buss v. Prudential Insurance Co.,* 126 F. 2d 960) all persons sharing as partitioners in the property to be partitioned are clearly indispensable. The object of the actions in other precedents relied upon by Appellant (*Shields v. Barrow,* 17 How. 130, 15 L. Ed. 158; *Simon v. Shaffer,* 11 F. Supp. 450; *O'Brien v. Markham,* 17 F. Supp. 633; *Ryan v. Seaboard etc. Co.,* 89 F. 397) was to rescind or cancel a contract, deed, will or trust instrument, and the courts correctly held that all persons whose rights depended upon contract, deed, will or indenture sought to be cancelled or rescinded were indispensable parties. Similar relief is not requested in the instant case. Appellee submits that the dictum in the case, *Crutcher v. Joyce,* 134 F. 2d 809, is wrong, and is not supported by the authority of *Baird v. Peoples Trust Co.,* 120 F. 2d 1001, upon which it relied. As suggested above, the latter case held only that remaindermen are indispensable parties to an action by a life beneficiary against the trustee complaining of the management of the trust property.

The balance of the federal decisions cited by Appellant, although helpful for general statements of legal principles, do not purport to present factual situations even faintly similar to the facts of the instant case.

It is respectfully suggested that the problem of indispensable parties in this case is governed by the controlling federal decisions which have been cited. Although the great majority of the decisions of state courts, relied upon by appellant, fall into the distinguishing classes heretofore suggested, those that do not, either in decision or dictum, may well be disregarded. The decisions by federal courts have been reached in the light of other restrictions on federal jurisdiction, particularly those involved in the concept of diversity of citizenship and these limitations are not present in the state tribunals. Hence, authorities from state courts are not helpful in the instant case, especially where the exact question has been decided by the Supreme Court of the United States and other federal courts. These federal decisions have consistently held that a decree may be so framed as not adversely to affect the rights of an absent co-beneficiary of a trust. (*Payne v. Hook,* supra, *Waterman v. Canal-Louisiana Bank,* supra, *Edenborn v. Wigton,* supra).

The first portion of Appellant's argument (opening brief pages 6-10) seeks to place Edgar L. Plummer in a unique position as an indispensable party. The argument is based on the Court's finding (R. 94) that Clarence Sadler is the equitable owner of an undi-

vided 29% of the trust property. This follows the allegation of the Amended Complaint (R. 54), which was deemed proper to show that Appellee's interest in controversy exceeded the jurisdictional sum of $3,000.00. Appellant's computation of the interest of Edgar L. Plummer in the trust fund is reached by granting him the interest his mother, Wilhelmina Sadler Plummer, who predeceased testator, would have had had she survived her father, Reinhold Sadler. Appellee's computation of his 29% interest is reached by giving effect to the "gift over" clause in Reinhold Sadler's will (R. 9).

Whichever method of computation may ultimately be adopted is irrelevant to the issues on this appeal. Appellee did not seek by his Amended Complaint, and the Court did not grant in its Decree (R. 101-3), a determination of his beneficial interest, or a distribution of that interest to him. The Court decreed in personam against Edgar Sadler that he holds and possesses the Diamond Valley Ranch, appurtenances, livestock and equipment in trust for "plaintiff, Clarence Sadler, the heirs of Alfred R. Sadler, deceased, Edgar L. Plummer, and for defendant Edgar A. Sadler, in the amount and shares to which each of the above named individuals may be entitled by the terms of the last will and testament of Reinhold Sadler, deceased, and the Statutes of Descent of the State of Nevada."

It is elementary that a party may appeal only from action taken by the Court adversely affecting his interests. The trial Court in this case took no action

whatever purporting to fix the distributive share of any beneficiary, but expressly reserved any such determination for future action (R. 102-3).

THE TRIAL COURT DID NOT HOLD IT COULD TAKE POSSESSION OF ANY PROPERTY IN THE POSSESSION OF THE STATE DISTRICT COURT OF NEVADA IN AND FOR ORMSBY COUNTY.

Appellant's argument (Appellant's Brief, pages 33-35) is based on factual assumptions which are entirely foreign to the instant case. The present action is an equitable action in personam against Edgar A. Sadler to determine and establish his status with regard to the Diamond Valley Ranch, cattle and appurtenances, under a trust agreement executed twelve years after the death of Reinhold Sadler. The decree entered by the Court operates in personam against the defendant. Such an action is expressly authorized by the decision in *Waterman v. Canal-Louisiana Bank & Trust Co.,* 215 U.S. 33, 54 L. Ed. 80, 30 S. Ct. 10, cited by Appellant.

Authorities cited by Appellant to the effect that the federal courts cannot administer the estate of a deceased person are not pertinent here. This action is not brought by, for the benefit of, or against the estate of Reinhold Sadler, and Reinhold Sadler's will is material to the case only because it was incorporated by reference in the trust agreement to identify, and fix the interests of, the beneficiaries under the trust agreement. The evidence does not show, and

the trial court did not find (R. 88) that Reinhold Sadler owned the trust res at the time of his death, or that it was ever claimed or possessed by the administratrix as part of his estate (R. 204), although it is true that in the litigation with the Huntington and Diamond Valley Stock and Land Company the Reinhold Sadler heirs asserted their defenses jointly in contesting that quiet title suit, and so acted in the settlement of it.

It seems to Appellee that Appellant's contentions are fully answered by the similar factual situation, and holding of the Nevada Supreme Court, in the case of *Winters v. Winters,* 34 Nev. 323, 123 P. 17, 1135. This defendant, Edgar A. Sadler, may well deem it necessary to grasp at straws to evade his trust responsibilities, but he cannot avoid the fiduciary obligations which he assumed by seeking to set up a claimed adverse title or interest in the trust res in some third party. Cf. 65 *C. J. "Trusts",* 1021, *Backus v. Backus,* 207 Mich. 690, 175 N.W. 400; *Issacs v. De Hon,* 11 F. 2d 943.

APPELLEE'S ACTION DOES NOT SEEK TO IMPEACH OR NULLIFY THE DECREE IN THE QUIET TITLE SUIT, BUT IS BROUGHT IN SUBORDINATION TO IT AND IN RECOGNITION OF IT.

The decree entered in the quiet title suit in Elko County, Nevada on March 2, 1918 was entered by consent, to effectuate a compromise agreed upon by the parties to the action. The facilities existing inci-

dent to the pendency of the quiet title action were utilized to accomplish the conveyance of the legal title to the Diamond Valley Ranch to Edgar and Alfred Sadler. Appellee is not attacking the judgment in the quiet title suit, but is asserting rights arising concurrently with its entry, which are not inconsistent with it.

The situation here involved is no different in principle from that presented by a suit to establish a resulting or constructive trust in the face of a warranty deed to the alleged trustee, or an express trust based on a declaration of trust executed by a grantee under a warranty deed, or to have a deed absolute declared to be a mortgage. The contention in those cases that the deed is conclusive and cannot be collaterally attacked has uniformly been rejected, and it has been pointed out that the plaintiff by his action is not attacking the deed, or its effect, but recognizes it and asserts equities arising under it, and not in conflict with it. Cf. *Dalton v. Dalton,* 14 Nev. 419; *Bowler v. Curler,* 21 Nev. 158, 26 P. 226; *Sime v. Howard,* 4 Nev. 473; *Alter v. Clark,* 193 F. 153.

Here, Clarence Sadler is not attempting to impeach, set aside or collaterally attack the decree entered in the Elko County quiet title suit. He recognizes it, and asserts that it was entered with his consent and the consent of the other parties to the Stipulation (R. 18) as one step in the fulfillment of the settlement agreement entered into between them. He now seeks to enforce in this action the unexecuted portion of that agreement. From this point of view, a complete

answer to Appellant's contentions is found in the decision of the Supreme Court of the United States in the case, *Union Pacific Ry. Co. v. Stewart,* 5 Otto 279, 24 L. Ed. 431, where it is said: "The decree of the Kansas State Court having been entered by consent, and in part performance of the agreement of settlement, is not a bar to a suit for an appropriation of the fruits of the settlement."

THE APPELLEE ESTABLISHED BY CLEAR, SATISFACTORY AND UNEQUIVOCAL EVIDENCE THE CREATION ON MARCH 2, 1918 OF AN EXPRESS TRUST, PURSUANT TO AN AGREEMENT BETWEEN THE HEIRS OF REINHOLD SADLER WHICH WAS EVIDENCED IN WRITING SUBSCRIBED BY THE PARTIES DECLARING THE SAME.

The portion of Appellant's Brief from pages 44 to 56 complains, in varying ways, of an alleged insufficiency in Appellee's proof. As a preface to the argument herein, Appellee for the convenience of the Court has summarized the evidence in a Statement of the Case, to which the attention of the Court is respectfully directed.

Appellee conceded in the trial court that the burden was on him to establish the trust by clear, satisfactory and unequivocal evidence. Appellee challenges appellant to show that the trial court did not apply the rule in deciding the case, or that the burden of proof, as stated, was not met by Appellee.

Insofar as proof of an oral agreement or understanding as found by the trial court (R. 91), is concerned preceding the execution of the Stipulation

dated February 14, 1918 (R. 18), the writing of the Louisa Sadler letter dated February 29, 1918 (R. 282) the filing of the Stipulation in the quiet title suit on March 2, 1918 (R. 21), the entry of a decree in the quiet title suit on March 2, 1918 (R. 23), the execution of a deed on March 2, 1918 (R. 35), the execution of a real and a chattle mortgage on March 2, 1918 (R. 538, R. 231) and the signing of Exhibit 8 on March 2, 1918 (R. 41) we can do no better than to quote the statement of the trial court in its Opinion (R. 86): "The events of March 2, 1918, the stipulation, the decree, the deed and the agreement, Exhibit 8, did not just happen. They resulted from an understanding and agreement between Edgar Sadler, Alfred Sadler, Bertha Sadler and Mrs. Louisa Sadler. * * *" Judges, when they take office, are not required to abandon common sense and shed the knowledge they have gained from practical experience.

Much less than the evidence produced in this case has been sufficient to establish a trust by clear and convincing evidence. For example, in the case of *Dalton v. Dalton,* 14 Nev. 419, an absolute deed was defeated and a constructive trust imposed on real property entirely on oral testimony, and in so holding the Nevada Supreme Court reversed the decision of the trial court.

Appellant also relies upon the Statute of Frauds, the pertinent section of the Nevada statute being quoted on page 53 of Appellant's brief, but it is not clear to Appellee from the brief in what particular

respect the fully documented series of transactions proved by Appellee is deemed insufficient to satisfy the Statute referred to. The principles relied upon by Appellee are stated in the Restatement of Trusts as follows:

Restatement of Trusts, Sec. 46

"A memorandum properly signed is sufficient to satisfy the requirement of the Statute of Frauds if, but only if, it sets forth with reasonable definiteness the trust property, the beneficiaries and the purposes of the trust."

Restatement of Trusts, Sec. 48

"A memorandum may be sufficient to satisfy the requirements of the Statute of Frauds, although consisting of several writings."

"*Comment*: The memorandum may consist of several writings * * * though one writing only is signed (by the party sought to be charged) if it appears from examination of all the writings that the signed writing was signed with reference to the unsigned writings."

The following general text authorities are cited in support of the "Restatement":

Perry on Trusts and Trustees (7th Ed.) Vol. I, pp. 76-83, pp. 90-92;
65 *C. J. "Trusts",* p. 259, sec. 40;
65 *C. J. "Trusts",* p. 262, sec. 42;
65 *C. J. "Trusts",* p. 263, sec. 43;
54 *Am. Jur. "Trusts",* p. 56, secs. 45, 46.

If the trust agreement, Exhibit 8, signed by Edgar and Alfred Sadler be deemed uncertain in any par-

ticular, it may be construed in connection with the circumstances surrounding its execution, and the other documentary evidence which was part of the some transaction.

Appellant again adverts to the Statute of Frauds in the last section of his brief (pp. 72-78) stating: "* * * the statute N.C.L., sec. 1527, includes equitable estates and hence said exhibit 8 is void under said statute because not signed by all holders of beneficial interest." Appellee hesitates to try to answer the argument under this heading because it is incomprehensible to him. Admitting the premise that transfers of equitable estates are governed by the statute of frauds, Appellee fails to see its application to the facts of this case. The agreement, Exhibit 8, is signed by Edgar and Alfred Sadler, the holders of the legal title, the parties "creating, granting, assigning, surrendering or declaring" the trust. If appellant means by his argument that the Elko County quiet title suit could not have been settled without the consent of all the parties, why ignore the Stipulation, (R. 18) signed by all? If he intends to suggest that after March 2, 1918, the beneficial owners of the trust property could transfer their interests only in writing, this we admit and we disclaim any contention that any subsequent transfers have taken place. Surely there is nothing in the evidence tending to show that Clarence, Bertha or Louisa Sadler have "released" their interests, or have "surrendered, rescinded or abandoned" the trust (see Appellant's Brief p. 76).

APPELLEE WAS GUILTY OF NO UNREASONABLE OR PREJUDICIAL DELAY IN COMMENCING SUIT TO ESTABLISH THE TRUST SIX MONTHS AFTER ITS REPUDIATION BY APPELLANT.

The trial court found that there was no denial, disclaimer or repudiation by defendant-appellant Edgar A. Sadler of the trust relationship at any time prior to March 5, 1944 (R. 94). This action was commenced on September 6, 1944. The trial court found that plaintiff-appellee has not been guilty of laches in the bringing and maintaining of this action (R. 94). These findings are based on the evidence summarized in the Statement of the Case, at the commencement of this brief, and in so finding the trial court inferentially and necessarily discredited the testimony of appellant Edgar A. Sadler, and his wife, Ethel Sadler. The determination of the credibility of the evidence and the testimony of witnesses is within the exclusive province of the trial court. Further, the evidence so summarized clearly establishes a consistent recognition of the trust through the years and until March 6, 1944, rather than a repudiation of it.

The doctrine of laches is not available to defeat an express trust unless the trustee has clearly and unequivocally repudiated the trust with the knowledge of the beneficiary, and the beneficiary has thereafter delayed bringing an action for a long period of time to the prejudice of the trustee.

65 *C. J.* "*Trusts*", p. 1023, sec. 955;
54 *Am. Jur.* "*Trusts*", p. 448, sec. 580;
Restatement of Trusts, Sec. 219 (2);

Keller v. Washington, 98 S.E. 880, 83 W.Va. 659;
Stephenson v. Stephenson, 171 S.W. 2d 565, 351 Mo. 8.

When positive evidence exists which proves that defendant has all along recognized the plaintiff's right, delay on the part of plaintiff in bringing suit will be excused and the continued acknowledgement by defendant of plaintiff's right is sufficient to account for any delay by plaintiff in bringing suit to enforce it.

19 *Am. Jur. "Equity",* p. 348, sec. 503;
Bogert "Trusts & Trustees", Vol. 4, p. 2748;
30 *C.J.S. "Equity",* p. 550, sec. 126;
Fleming v. Shay, 125 P. 761, 19 Cal. App. 276.

A family relationship existing between the trustee and beneficiary making a settlement out of court more natural, rebuts the imputation of laches.

Bogert "Trusts & Trustees", Vol. 4, p. 2784;
Stephenson v. Stephenson (supra);
Rottman v. Rottman, 204 P. 46, 55 C.A. 624;
30 *C.J.S. "Equity",* p. 556, sec. 129.

Laches does not result from delay alone, but from a delay which is prejudicial to the party asserting laches as a defense. In the instant case, no claim of prejudice to Edgar A. Sadler resulting from the delay is made, other than the death of Alfred Sadler. It seems to Appellee that the evidence clearly shows that the death of Alfred Sadler was prejudicial to Appellee, rather than Appellant; that Edgar Sadler

necessarily and cautiously waited until after Alfred's death to deny his fiduciary obligations; that Alfred Sadler would have been Appellee's rather than Appellant's witness, and should we surmise that Alfred would have testified for Edgar, his testimony would have been so thoroughly impeached by the letters and other documentary evidence as to render it worthless. In the absence of a showing of prejudice resulting from the delay, the equitable defense of laches cannot be sustained.

Pomeroy's Equity Jurisprudence, Vol. 4, p. 3417, sec. 1142;
Cooney v. Pedroli, 49 Nev. 55, 235 P. 637.

Here it does not appear that Appellant has lost an advantage by reason of the death of Alfred Sadler. On the contrary, the loss has been suffered by Appellee. Alfred's death is the only claim of prejudice we can discern from a reading of Appellant's brief. Further, in the instant case the evidence has not been obscured by the passage of time—it is not uncertain, conflicting or doubtful. The proof establishing the trust relationship is clear, convincing and practically uncontradicted.

The determination of an alleged defense of laches rests upon the particular circumstances of each case.

Cooney v. Pedroli (supra);
Kleinclaus v. Dutard, 81 Pac. 516, 147 Cal. 245.

The question of laches is addressed to the sound discretion of the trial judge. Here the trial judge found Appellee not guilty of laches (R. 94). This

decision will not be disturbed on appeal, there clearly being no basis for charging the trial court with an abuse of discretion.

The Kermit, 76 F. 2d 363 (9CCA).

"As the decisions indicate, the question of laches is addressed to the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion. In this case we cannot say that the lower court abused its discretion."

The following authorities support the finding of the trial court under circumstances similar, with variations, to those in this case.

Hughes v. Silva, 184 P. 415, 42 Cal. App. 785;

Davies v. Metropolitan Life Ins. Co., 63 P. 2d 529, 189 Wash. 138;

Hansen v. Bear Film Co., 168 P. 2d 946, 28 C 2d 191;

Wight v. Rohlffs, 72 P. 2d 142, 9 C 2d 620;

Boardman v. Watrous, 35 P. 2d 1106, 178 W. 690;

Enyart v. Merrick, 34 P. 2d 629, 148 Ore. 321.

The statement in Appellant's brief (pp. 57-58) that "Alfred R. Sadler, one of the alleged beneficiaries, certainly had notice that Edgar A. Sadler disclaimed and denied any trust so far as plaintiff was concerned," is without support in the record, and is contrary to the finding of the trial Court. The case of *Williams v. Woodruff,* 85 P. 90, 35 Colo. 28, involving lack of diligence to ascertain the right to

enforce a constructive trust, does not help Appellant here where we have an express trust expressly recognized through the years. Fraud is not involved here, as was the case in *Fortner v. Cornell,* 163 P. 2d 299, 66 Ida. 512. In *Robertson v. Burrell,* 42 P. 1086, 110 Cal. 568, no claim had been asserted for thirty-one years, and there had been no recognition during that time of the rights of the beneficiaries.

The distinguishing features of the situation involved in *Cooney v. Pedroli,* 49 Nev. 55, 235 P. 637, are indicated by the following excerpts from the opinion:

> (1) "Every case must depend on its own circumstances."
>
> (2) "The complaint shows a great lapse of time, 22 years, from the creation of the alleged trust. During all of this time Charles Pedroli was in possession of the property openly and notoriously exercising dominion over it as though it were his sole and separate property."
>
> (3) "Beyond the bare statement in the complaint that Charles Pedroli was the trustee of his brother and sister, and that he at all times admitted and recognized their right, there is nothing in the complaint to support the claimed trust relation. * * * No act of recognition is alleged."
>
> (4) "No reason is alleged in the complaint for respondent's long delay in making any claim to the property or asserting any interest as to Charles Pedroli's management of their share of it or desire to enjoy any of the profits from it * * *"

(5) "It seems incredible, however, that in all of these years and when the property was being managed profitably by Charles Pedroli that respondents should have no desire to share in any portion of the profits."

(6) "These facts, together with the prolonged silence of the respondents during the lifetime of Charles Pedroli concerning their alleged interest in the property, present a case of grave doubt as to the existence of the trust claimed."

(7) "Even if the trust relation were admitted, the futility of entering on an investigation after such a lapse of time when the trustee is dead, to determine equitably what portion belonged to his estate and what portion belonged to respondents, is apparent."

Similarly, the differences in the case of *Kleinclaus v. Dutard,* 81 P. 516, 147 Cal. 245, are apparent from the following excerpts from the opinion:

(1) "As has often been said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine (laches). Each case, as it arises, must necessarily be determined by its own circumstances."

(2) "We must take the whole complaint together, and, so taken, it presents a case where every act of the alleged trustee was openly and notoriously hostile to the claim of plaintiffs."

(3) "He (the trustee) never by any act recognized any other person as having an interest therein."

(4) "They show a case where there was in fact no such acknowledgment of an existing trust as would excuse the enforcement of the claim for 35 years, and until after the death of the alleged trustee."

(5) "they show also a case of acquiescence by the alleged beneficiaries under such circumstances as to practically compel the conclusions that their claim is without foundation in fact."

(6) "The circumstances of this case are such that a court could not hope to do justice between these parties, were the trust relation clearly shown; and this constitutes another ground for the application of the doctrine of laches, for the difficulty is due entirely to the inexcusable delay."

In *Coyle v. Lamb,* 55 P. 901, 123 Cal. 264 relied upon by Appellant, the court, without discussing principles, held an action to collect delinquent rental barred by laches because the lease had expired 9 years before suit was brought, the lessee had died, and the property had been conveyed to another 8 years prior to suit. None of these facts is present in this case.

For the reasons stated, supported by the authorities we have cited, Appellee sees no merit in Appellant's contention that the findings of the trial court that there was no repudiation of the trust until after May 5, 1944 and that Appellee was guilty of no laches or unreasonable delay in commencing or maintaining this action should be reversed on review.

THE EVIDENCE IS CLEAR THAT AFTER THE DEATH OF REINHOLD SADLER IN 1906, HIS HEIRS CLAIMED THROUGH HIM AN INTEREST IN THE DIAMOND VALLEY RANCH, AND OTHER PROPERTIES IN ELKO AND WHITE PINE COUNTIES.

Appellant (Appellant's brief pp. 66-69) contends that the trial court erred in finding that Reinhold Sadler was the owner of any interest in the Diamond Valley Ranch. As a matter of fact, the court did not so find. (R. 88, finding No. 2). The court did find that Reinhold Sadler at the time of his death was the owner of and in possession of certain shares of stock in the Huntington Valley Stock & Land Company, a corporation.

The evidence is that Reinhold Sadler at one time owned the Diamond Valley Ranch (R. 602) and deeded it to the Diamond Valley Livestock and Land Company; that his administratrix inventoried 4000 shares of the Huntington & Diamond Valley Livestock and Land Co. as part of his estate (R. 206); that he had pledged 1999 shares of the stock of the Huntington and Diamond Valley Land and Stock Co. to Minnie C. Sadler (R. 214); that after Reinhold Sadler's death his heirs among them Edgar Sadler, claimed some interest in the Diamond Valley Ranch and other properties held by the Huntington and Diamond Valley Stock and Land Company, (R. 143, 144, 146); that in December, 1915 the Huntington and Diamond Valley Stock and Land Company brought a quiet title suit regarding the property against the Huntington Valley Stock and Land Company, the Diamond Valley Livestock and Land Company, the

heirs of Reinhold Sadler, and others (R. 12), which was jointly defended by the heirs of Reinhold Sadler, and in which a decree was entered by consent on March 2, 1918 (R. 23).

We are not here interested in again quieting the title to the Diamond Valley Ranch, this suit being brought to assert equities arising under and concurrently with the decree in that suit. Appellant does not point out how the question of ownership of the property prior to March 2, 1918 is material to his defense. The evidence Appellee has summarized is material, so far as we are concerned, to show the background for, and circumstances surrounding the execution of, the trust agreement on March 2, 1918.

THE TRUST AGREEMENT DATED MARCH 2, 1918 (EXHIBIT 8) IS SIGNED BY THE PARTIES DECLARING THE TRUST, AND IS A SUFFICIENT MEMORANDUM.

Fnally, Appellant argues that the trust agreement, (Exhibit 8, R. 41) is insufficient because it is signed by only two of the five parties in interest.

We take issue with Appellant's statement that the agreement shows on its face that it was intended to be signed by all. We find no such expression of intention. Further, the letter from Louisa Sadler to Alfred Sadler dated February 29, 1918 (R. 282), prompting the execution of the written memorandum, Exhibit 8, states: "Bertha and Myself wanted you and Edgar to write a agreement". The old mother knew, if counsel for Appellant doesn't, that she,

Bertha and Clarence Sadler had performed their obligations under the settlement, and the only remaining unexecuted portions of the settlement agreement were obligations of Alfred and Edgar Sadler, as trustees.

The Nevada Statute of Frauds, N.C.L. 1527, requires only that the trust agreement be signed by the parties sought to be charged. Exhibit 8 should be construed in the light of the existing circumstances and the other documents executed contemporaneously with it. Louisa, Bertha and Clarence Sadler had done everything they were required to do in perfecting the settlement of the quiet title action. The only executory promises remaining were charged against Edgar and Alfred Sadler. This unilateral undertaking was fully memorialized in writing by exhibit 8 subscribed by the only parties upon whom were imposed unfulfilled promises.

Appellant's authorities involving contracts bilateral in character, imposing obligations on parties who had not executed the contracts, are not pertinent here.

And again, if we bow to Appellant's insistence that something must have been signed by all the Sadler heirs, why ignore the Stipulation (Exhibit 16, R. 18)?

CONCLUSION.

Appellee respectfully submits that the findings and decree of the trial court are fully supported by the evidence, that indispensable parties are not absent,

and that justice requires an affirmance of the decision appealed from.

Dated, Reno, Nevada,
January 8, 1948.

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